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No. 76-451

# In the Supreme Court of the United States

OCTOBER TERM, 1976

ALABAMA POWER COMPANY, PETITIONER

*v.*

RAYMOND E. DAVIS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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The question presented is whether under the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. (Supp. V) 2021 *et seq.* ("Act"),[1] a returning veteran is entitled to credit for his time in military service in the computation of the pension benefit provided by his employer.

1. Respondent, Mr. Raymond E. Davis, a World War II veteran represented by the Department of Justice pursuant to 38 U.S.C. (Supp. V) 2022 (then Section 9(d) of

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[1]Congress has periodically reenacted without significant change the veterans' reemployment provisions at issue here since their original enactment in 1940. See *Foster* v. *Dravo Corp.*, 420 U.S. 92, 96 and n. 6. They have recently been codified in 38 U.S.C.

the Selective Service Act of 1948, 62 Stat. 616, as amended, 50 U.S.C. App. 459(d)), sued his former employer, Alabama Power Company, seeking credit under the Act for his military service in the computation of his pension benefit.

Mr. Davis had been an employee of Alabama Power Company for approximately six and one-half years when he left its employ in March 1943 for World War II military service. After two years and seven months of military service, he was honorably discharged in October 1945 and was reinstated to his former position with Alabama Power Company. Mr. Davis retired from Alabama Power on June 1, 1971. In computing Mr. Davis' pension benefit, the Company failed to credit Mr. Davis with the two years and seven months he spent in military service. Under the Company's pension plan, the amount of an employee's monthly benefit is computed by multiplying approximately one percent of his last month's earnings by his total years of service (Plan Section V. 4(c), Pet. App. 50a-52a). Under this formula, Mr. Davis receives a monthly benefit of $198.95, which is $17.11 less than he would receive had his years of military service been counted.[2]

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(Supp. V) 2021 *et seq.* by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1578, 1594.

[2]Alabama Power Company's pension plan provides benefits to employees who have been continuously employed for specific periods of time, Plan Section III.4, Pet. App. 41a-42a. The plan contains a fifteen or twenty year vesting period, Plan Section VII, Pet. App. 69a-70a. Pension credit accrues only to "full time regular employees," Section II.1, Pet. App. 37a-38a, which the parties have stipulated to mean employees who work 40 hours per week for an indefinite period of time. See Pet. App. 7a.

Military service is not considered a break in service, Section III.3(a), Pet. App. 40a, and is counted for purposes of the vesting requirement, Section VII, Pet. App. 69a-70a, but it is not included in computing the amount of the monthly benefit except in circumstances not applicable to Mr. Davis. Plan Section III.3, Pet. App. 40a. See also Pet. 4, n. 2.



This suit was filed on December 20, 1972. The complaint alleged that the Act required Alabama Power Company to credit Mr. Davis with his two years and seven months of World War II military service in the calculation of the amount of the pension benefit due at his retirement on June 1, 1971. The district court ruled that the pension benefit constituted a "seniority" right and that the Act required the Company to credit Mr. Davis' time in military service in the computation of his pension. 383 F. Supp. 880 (Pet. App. 4a-28a). The court found that the pension benefit was primarily based on the "total time of employment," not on total amount of work performed (Pet. App. 12a), and that the purpose of the pension benefit was to promote personnel stability. Therefore, it concluded the "real nature" of the benefit made it a perquisite of seniority (Pet. App. 14a). A divided panel of the court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a).

1. Petitioner contends that the additional seniority to which the Act entitles a veteran for his military service does not entitle him to credit, in the determination of his pension benefits, for the period of his military service. The court of appeals correctly held, however, on the basis of the district court's comprehensive opinion, that pension benefits are perquisites of seniority, and that military service must therefore be credited in computing them. This follows, we believe, from *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, which held that the seniority benefits to which a veteran is entitled are not

determined by narrow technical definitions or collective bargaining agreements, but by the real nature of the employment rights at issue, examined in the light of the beneficial intent of Congress in adopting the Act. Cf. *Palmarozzo* v. *Coca-Cola Bottling Co. of New York*, 490 F. 2d 586, 591-592 (C.A. 2). We recognize, however, that the decision below is basically inconsistent with decisions of the Third and Tenth Circuits which have held that pension benefits are not perquisites of seniority under the Act. *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (C.A. 3); *Jackson* v. *Beech Aircraft Corp.*, 517 F. 2d 1322 (C.A. 10).[3] Moreover, in *Smith* v. *Industrial Employers & Distributors Association*, C.A. 9, Nos. 75-1327 and 75-1333 (decided November 23, 1976), affirming 385 F. Supp. 1281 (N.D. Cal.), the Ninth Circuit has adopted another approach which entitles a veteran to credit for military service in the computation of pension benefits awarded for employment prior to establishment of a pension plan, but excludes such service if it occurred after establishment of the plan.

Although the government and respondent believe that the decision below is correct, we have been authorized by respondent to urge that the Court grant the petition. The circuits have adopted inconsistent analyses of the issue, and have reached inconsistent results with respect to pension plans that are similar in significant respects.[4]

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[3]District courts in the Sixth and Ninth Circuits which have considered this issue have reached opposite results. *LaPinta* v. *Ohio Crankshaft*, 77 CCH Labor Cases par. 11,156 (N.D. Ohio), appeal pending, C.A. 6, No. 76-1158; *Smith* v. *Industrial Employers & Distributors Association*, 385 F. Supp. 1281 (N.D. Cal.), affirmed, C.A. 9, Nos. 75-1327 and 75-1333 (decided November 23, 1976).

[4]For example, under the Ninth Circuit's approach in *Smith*, Mr. Davis would presumably be entitled to credit for only sixteen of his thirty months of military service because Alabama Power instituted its pension plan while Mr. Davis was in the Armed Forces. Under the approach apparently adopted by the Third and Tenth Circuits, Mr. Davis would probably not be entitled to any credit.



The disparate results in these decisions are not based upon differences in the details of individual plans, but on differences in analysis of the issue in light of the Act's purposes. The pension plans in all of these cases, though not identical, uniformly require that work be performed in each of a substantial, continuous number of years, and calculate the amount of the pension benefit by reference to the number of years in which work is performed. The Third and Tenth Circuits and, with respect to post-plan benefits, the Ninth Circuit, appear to consider the entitlement to benefits as being governed primarily not by time, but by work actually performed. The pension is thus viewed as a kind of deferred compensation for a substantial work requirement unrelated to seniority. Under this view veterans' rights can be controlled by the employer alone, or by agreement with a union. The Fifth Circuit, on the other hand, has looked to the real nature of the benefits and concluded that "the computation is essentially based upon seniority, since it is based entirely upon time, and not at all upon the amount of work actually performed * * * . Time is the essence of seniority * * * " (Pet. App. 12a).

Whether pension benefits constitute perquisites of seniority under the Act is a question of great importance to veterans, employers, labor unions, and pension plan administrators. So long as it remains unresolved, it promises to generate an increasing volume of litigation as World War II veterans reach retirement age.[5] We are

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[5]See Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45, 69-70 (1975).

advised by the Department of Labor that in addition to the cases already discussed, ten other pension cases are now pending in the district courts and 36 more are ready for filing.[6] Many of these cases will involve nationwide companies which operate facilities in several circuits. A continuing conflict among the circuits would subject these companies to conflicting rules and cause great uncertainty over veterans' pension rights that will encourage further litigation. The present case is, in our view, an appropriate one for resolution of the issue by this Court, and we therefore urge that the petition for a writ of certiorari be granted.

3. If the petition is granted, review should be limited to the principal question presented (Pet. 2, Question 1) and should not include petitioner's "subsidiary issue" involving the applicability of the Alabama one-year statute of limitations (Pet. 2, 12). The district court correctly ruled that Mr. Davis' claim was equitable in nature and therefore was not barred by the Alabama statutes of limitations. Pet. App. 22a-24a. While the case was pending on appeal, the Act was amended to clarify the legislative intent that state statutes of limitations are not to apply.[7] The prior Fifth Circuit cases which petitioner relies upon[8] were

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[6]The Secretary of Labor assists veterans in their efforts to secure their reemployment rights. 38 U.S.C. (Supp. V) 2025.

[7]"No State statute of limitations shall apply to any proceedings under this chapter." 38 U.S.C. (Supp. V) 2022. See *Hirschberg* v. *Braniff Airways, Inc.*, 404 F. Supp. 869 (E.D. N.Y.).

[8]*Blair* v. *Page Aircraft Maintenance, Inc.*, 467 F. 2d 815 (C.A. 5); *Bell* v. *Aerodex, Inc.*, 473 F. 2d 869 (C.A. 5).



specifically repudiated by Congress. S. Rep. No. 93-907, 93d Cong., 2d Sess. 111-112 (1974). The courts below correctly distinguished these cases, and their decision on the limitations issue does not warrant review by this Court.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1976.